PREPARED TESTIMONY

AND

STATEMENT FOR THE RECORD

OF

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ON

H.R. 1013

PRIOR NOTICE OF COVERT ACTIONS

BEFORE THE

LEGISLATION SUBCOMMITTEE

OF THE

HOUSE SELECT COMMITTEE ON INTELLIGENCE

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Mr. Chairman,

I very much appreciate the opportunity to testify on behalf of the American Civil Liberties Union on H.R. 1013. The ACLU is a non-partisan organization of over 250,000 members dedicated to the defense and enhancement of civil liberties guaranteed by the Bill of Rights.

There is no doubt, in my view, that Congress ought to go at least as far as this legislation does. Indeed, I believe that this legislation simply makes explicit what Congress clearly intended in 1980.

The record now before this committee and the nation demonstrate that covert operations are fundamentally incompatible with a democratic society. The ACLU has held that position for a number of years, and I have had the privilege of presenting it to this committee on more than one occasion. The basic argument is that covert operations are used by our Presidents to avoid the public and congressional debate mandated by the Constitution, a debate which is particularly crucial when questions of war and peace are at stake. Granting officials the authority to conduct covert operations inevitably leads to abuses of power, as it did in the Iran-contra affair. Officials begin to believe that they can and must lie to the American people and their colleagues, and that they have a license to break the law. These are the inevitable results of permitting such activities; they cannot be cured by more perfect legislation. (These arguments are spelled out in more detail in the first attachment

to this statement and I will not belabor them here.)

Taking as given that the committee at this stage is simply interested in clearing up the question of prior notice with regard to covert operations, let me offer the following observations.

First and most important, I would urge you to keep in mind what the 1980 Intelligence Oversight Act sought to accomplish. Its goal was to create a surrogate for public and full congressional debate. If this is done, it is essential to have the most complete possible substitute. Congress is thus entitled, in permitting such operations to go forward, to insist on procedures which in another context might constitute an unwarranted and even perhaps unconstitutional intrusion into the prerogatives of the President.

As the letters received by this committee from constitutional scholars make clear, there is no serious doubt as to the constitutionality of the provisions in the bill. I would go further and argue that they are necessary if the Congress is to perform its constitutional obligations to conduct effective oversight of activities which could lead to war.

During the first day of hearings on H.R. 1013, there were suggestions both from witnesses and members of the committee counseling against even this modest legislation. Two kinds of arguments were heard. The first suggested that since the key to effective oversight is cooperation between the executive and legislative branches, legislation would do no good and might even be counter-productive. The second suggested that the legislation would compel the intelligence agencies to disclose information

which might place the lives of agents in jeopardy. Let me express my views on both of these concerns.

Even a cursory review of the events of the past six years should leave no doubt that new legislation is necessary. The 1980 Intelligence Oversight Act was a carefully crafted compromise between the intelligence agencies and Congress. Its meaning was, I believe, well understood by all of those who participated in its drafting and approval. The difficulty, of course, arose because those in the executive branch who became responsible for its implementation after 1981 were not participants in the process. The new administration consistently chose on a range of issues, not simply the arms transfer to Iran, to ignore the letter as well as the spirit of the legislation. The statements of administration officials, and the legal analysis offered by the Department of Justice, leave no doubt that the administration never accepted the 1980 compromise. Oversight cannot work if there is fundamental disagreement about the President's obligations.

The record also makes it clear that legislative history, Presidential directives, and agreements between the intelligence committees and the Congress are no substitute for clear legislative language.

One does not have to read the legislative history of the 1980 Intelligence Oversight Act to understand that "timely" does not mean "never." The legislative history in fact leaves no doubt that the authority of the President to avoid prior notice could be exercised only in the most extraordinary circumstances, when the survival of the nation could be said to be at stake.

Moreover, it makes clear that "timely" notice could not be delayed indefinitely. Yet the administration on a number of occasions simply ignored, and perhaps was not even aware of, the legislative history of these phrases. Attachment two to this statement is a detailed analysis of the legislative history which leaves no doubt that the Act was repeatedly violated. Yet since this is not an area in which litigation is possible, there is no way to secure a judicial interpretation of the legislative history, or to enforce it.

Obviously, executive branch officials may simply choose to disobey the law. However, they are much more likely to do so when the words of the law are not absolutely clear, or when they seem to permit exceptions. Congress has an obligation not to offer such temptations to those who exercise power.

If careful legislative history is no substitute for statutory language, neither is a presidential directive. Here the report of the Tower Commission is instructive, even if its recommendations are not. The Commission notes that many of the procedural requirements that it recommends, and that would be mandated by the legislation you are considering, were included in an Executive Order in effect when this administration took office. That Order was replaced by a new one which did not include such procedures as requiring written findings, or consulting with members of the National Security Commission. The Tower Commission report states that the President later issued a secret directive, NSDD 159, which reinstated these procedures. But the report found that this directive was "promptly ignored"

in the Iranian arms sales.

From this history, the Commission reached the conclusion that the President should issue a directive and that it should be followed. From this history, this committee must conclude that any order that the President issues can be rescinded in public or in secret, or simply ignored.

Finally, explicit agreements between the intelligence committees and the Director of Central Intelligence cannot be counted on. Senator Moynihan has presented this committee with a copy of the agreements negotiated and signed by William Casey and the leadership of the Senate committee. They are staggering in what they reveal about the administration's willingness to abide by its agreements. Mr. Casey promised to inform the committee of any new Presidential findings in advance of implementation; he did not do so. He promised to let the committee know if any existing Presidential orders were ignored; he did not do so. Finally, he promised to notify the committee of any weapons transfers; he did not do so. The agreement was consistently disregarded by the administration. No committee serious about oversight would rely in the future on such agreements.

This brings me to the question of the committee's role in the oversight process. There is no doubt that the executive branch disobeyed the letter as well as the spirit of the law, both the Intelligence Oversight Act and the Boland Amendment. There is also little question in my view that this committee, and its counterpart in the Senate, failed to live up to its obligations. When Congress asks the public to accept secret operations and when it assigns committees to monitor them on

behalf of each house, those committees have a special obligation. Members of the committee and its staff must probe and question and take seriously charges of wrongdoing. With regard to the violation of the Boland Amendment, this committee did not, in my view, meet its responsibilities. One trusts that the lesson has been learned.

Let me turn briefly next to the issue raised by Admiral Turner and others about the risk of providing details about specific operations to any members of the Congress. I sympathize with the desire to keep such details secret, but I do not understand H.R. 1013 to require their disclosure. This concern confuses the requirement to notify the committees in advance about a covert operation with the requirement to keep the committees fully and currently informed and to inform them in advance of any significant anticipated intelligence activity.

The legislation would require advance notice of any Presidential finding authorizing a covert operation, but not necessarily of all specific details of the operation. Thus, to use Admiral Turner's example, if President Carter had issued a finding authorizing an operation to rescue the hostages in Iran, and had properly informed the two committees, neither the law as it now stands, nor as it would be amended, would require that the committee be noticed of each sub-operation. That is not to say that some activities within a covert operation should not be reported to the committees in advance, clearly they should. It is only to say that the law contemplated by the bill would not specify that they should.

If there is any ambiguity on this score, the legislation could, and probably should, be rewritten to separate the requirement with regard to a Presidential finding, which should be absolute, from the requirements to answer questions and to report in advance on other significant anticipated activities. With regard to the latter, some leeway and give and take between the committees and the executive branch may be in order. Once the committees know that an operation is underway, they have an obligation to press and probe and to make clear what information they want. I believe that the statute should require that the requested information be provided unless its compromise would directly and immediately place the lives of agents in danger during a finite period, and the proposed action did not raise questions of policy, propriety, or legality.

Finally, Mr. Chairman, I want to say a brief word about the proposal to create a joint intelligence committee. The Tower Commission, having detailed a willful refusal of the executive branch to obey the law, suggests that the solution is to create a single committee in the hope that executive branch officials would feel compelled to inform as required by the law. There are two fatal flaws in this argument. First, the Congress reduced the number of committees that had to be informed from eight to two based on exactly the same argument. Second, current law permits the President to notify only eight leaders of the Congress. Since he did not avail himself of this option in the case of the Iran operation, it is impossible to believe that he would have informed a joint committee. (Also attached is a more extensive analysis of the joint committee proposal.)

Mr. Chairman, let me once again commend you for holding these hearings and thank you for providing an opportunity to the ACLU to testify. I stand ready to answer your questions and to assist the committee in any way that we can.

Thank you.

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